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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD ELDER, et al.,
Petitioners

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT

CYNTHIA CALVERT
Counsel of Record
2323 E. Olive Avenue
Fresno, California, 93701
209-264-2323

LEN W. HOLT
1817 Carleton St.
Berkeley, CA 94703
415-841-7552

Attorneys for Petitioner

QUESTION PRESENTED

Whether criminal sanctions against mere spectators at a crime violate due process.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD ELDER, JAIME LYNN ROBINSON, PATRICK LEE NOLEN, ROBERT WILLIS, ATANSIO JIMINEZ, LINDA JOYCE ROBINSON, GERALD JAMES WATSON, UBALDO GARCIA, GEORGE RAYMOND LOFLIN, DAVID ROBERT POMBO, JOHN T. LOFLIN, RICARDO FRANCO VASQUEZ, JACK DONALD WALKER, JAMES WESLEY CRABTREE RICHARD FRANKLIN SQUIRE, ROBERT ELVIS WHITE, SALVADOR GUTIERREZ, MARIA GARCIA, and JOE FARIA, Petitioners.

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

The petitioners, RICHARD ELDER, JAIME LYNN ROBINSON, PATRICK LEE NOLEN,

ROBERT WILLIS, ATANSIO JIMENEZ, LINDA JOYCE ROBINSON, GERALD JAMES WATSON, UBALDO GARCIA, GEORGE RAYMOND LOFLIN, DAVID ROBERT POMBO, JOHN T. LOFLIN, RICARDO FRANCO VASQUEZ, JACK DONALD WALKER, JAMES WESLEY CRABTREE, RICHARD FRANKLIN SQUIRE, ROBERT ELVIS WHITE, SALVADOR GUITIERREZ, MARIA GARCIA, and JOE FARIA, respectfully pray that a Writ of Certiorari issue to review the opinion and order of the California Court of Appeal, Fifth Appellate District, entered in the above-entitled proceeding on June 3, 1988.

OPINIONS BELOW

The California Supreme Court Order Denying Review After Judgment by the Court of Appeal, entered September 15, 1988, is reprinted in the Appendix hereto, p. A-1, infra.

The opinion of the California Court of Appeal, Fifth Appellate District, is reported at 201 C.A.3d 1061 (1988) and is reprinted in the Appendix hereto, pp. A-2 through A-36.

The Order Re Writ of Mandate memorandum decision of the California Superior Court in and for the County of Fresno has not been reported. It is reprinted in the Appendix hereto, p. A-37 through A-40.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 USC Section 1257(3) on the grounds that their rights under the Fourteenth Amendment to the United States Constitution were violated.

The California Supreme Court denied review of their case on September 15, 1988. The instant Petition for Writ of

Certiorari is filed within 60 days of that order.

Petitioners have sought pre-trial review of the constitutionality of the statute under which they have been charged. Under California law the opinion of the California Court of Appeal, Fifth Appellate District, upholding the constitutionality of the statute, is the law of the case. Petitioners cannot seek further review of the decision on direct appeal after conviction. People v. Shuey, 13 C.3d 835 (1975).

Therefore, this case is reviewable by the United States Supreme Court. Camera v. Municipal Court, 38 U.S. 523 (1967).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Fourteen, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners were charged with being spectators at a cockfight, in violation

of California Penal Code Section 597b[1]

Petitioners challenged the constitutionality of the statute by demurrer to the charge on the grounds that section 597b criminally sanctions conduct which is constitutionally protected, being a spectator. Further, petitioners charged that the statute was void for vagueness and overbreadth.

The demurrer was denied by the

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[1] Section 597b provides:

"Any person who, for amusement or gain, causes any bull, bear, cock, or other animal, not including any dog, to fight with like kind of animal or creature, or causes any such animal, including any dog, to fight with a different kind of animal or creature, or with any human being; or who, for amusement or gain, worries or injures any such bull, bear, cock, dog or other animal, or causes any such bull, bear, cock, or other animal, not including any dog, to worry or injure each other; and any person who permits the same to be done on any premises under his charge or control; and any person who aids, abets, or is present at such fighting or worrying of such animal or creature, as a spectator, is guilty of a misdemeanor."

Fowler Justice Court, Fresno County, California. Petitioners successfully petitioned the Fresno County California Superior Court for a writ of mandate/prohibition. The Superior Court found that the use of the word spectator in the statute does not serve to put one on notice as to what conduct is criminal.

Respondent then petitioned the California Court of Appeal, Fifth Appellate District, arguing that the disputed language is unconstitutionally vague but rather provides fair notice of what constitutes criminal conduct.

The Court of Appeal granted Respondent's petition. It found the statute on its face to be unconstitutionally vague and insufficiently certain for due process purposes under both the California and United States Constitutions. However,

the Court of Appeal went on to uphold the constitutionality of the Statute by reading into it a specific intent requirement; construing the statute to require knowing presence as a spectator for the purpose of watching the animals fighting.

The Court of Appeal reached its result by reliance on a California Supreme Court Decision[2] which construed the "lewd and dissolute" solicitation language of California Penal Section 647(a)[3] as limited to the solicitation of

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[2] Pryor v. Municipal Court, 25 C.3d 238 (1979)

[3] Section 647(a) provides, in pertinent part:

"Every person commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

legally defined criminal sexual conduct. Petitioners contended in their Petition for Review to the California Supreme Court that this reliance was wrong because there is no legal definition of criminal spectating conduct, thus leaving the challenged statute void for vagueness and overbreadth.

REASONS FOR GRANTING WRIT

I.

THERE IS CONFLICT AMONG THE STATES ON THE QUESTION OF WHETHER CRIMINAL SANCTIONS AGAINST SPECTATORS ARE CONSTITUTIONAL

Six states have addressed this issue. California's decision is the one of which this petition seeks review. People v. Superior Court (Elder), 201 C.A.3d 1061 (1988).

The Hawaii Supreme Court held unconstitutional, on both federal and state constitutional grounds, a statute which proscribed presence at a cockfight. Hawaii v. Albellano, 50 Hawaii 384 (1968).

The Ohio Court of Appeals found unconstitutional, on both federal and state grounds, the statute which prohibited presence at or witnessing a cockfight. State v. Wear, 15 Ohio App.3d 77 (1984).

In State v. Young, 695 S.W. 2d 882 (Mo. 1985), the Missouri Supreme Court En Banc found unconstitutional, under the United States Constitution, the criminal cockfighting statute which proscribed presence at a cockfight.

The Utah Supreme Court upheld its statute prohibiting spectators at cockfights. The court did not directly

address the constitutional issues. Peck v. Dunn, 574 P.2d 367 (Utah 1978).

The Tennessee Supreme Court upheld that state's statute which prohibited persons knowingly present as spectators with the specific intent to be a spectator. State v. Tabor, 678 S.W.2d 45 (Tenn. 1984).

The California decision adopts the reasoning of the Tennessee and Utah courts. The Missouri decision rejects the reasoning of the Tennessee and Utah courts.

II.

THE VARIOUS STATE COURT DECISIONS LEAVE UNRESOLVED THE ISSUE OF CRIMINAL LIABILITY OF SPECTATORS

The term spectator has no technical legal meaning. It is a word of common usage, defined in dictionaries as: "1.

One who attends and views a show, sports event or the like. 2. An observer of an event; eyewitness; onlooker."[4]; "....one who looks on; one who sees or beholds a given thing or event without talking an active part."[5]; "one that looks on or beholds; esp: one witnessing an exhibition (as a sports event)."[6] [7]

The state courts have attempted to draw distinctions between what presence at a cockfight can be proscribed and yet give fair notice with sufficient

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[4] The American Heritage Dictionary (New College Ed. 1981)

[5] Webster's New Universal Unabridged Dictionary

[6] Webster's Third International Dictionary (1986)

[7] Three definitions of spectator were recited below by the Court of Appeal and the Superior Court. See Appendix A, pp. A-7, A-22, A-23, A-39.

certainty to a person of ordinary intelligence what conduct is criminal.

Petitioners argued below the reasoning set forth in the concurring opinion in Hawaii v. Abellano, supra, 50 Hawaii 384 (1984). If presence at a scene of a crime can be proscribed, freedom of movement and individual rights to privacy would be violated. The California Court of Appeal rejected this argument on the basis that spectators or eyewitnesses to the other crimes are not similarly situated as spectators at cockfights: "a witness to a murder or other crime does not, under ordinary circumstances, encourage the crime." People v. Superior Court (Elder), supra, 201 C.A.3d 1061, 1073.[8]

Mere presence at the scene of a

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[8] Appendix B to this petition, pp. A-33, A-34.

crime cannot be constitutionally proscribed. State v. Wear, supra, 15 Ohio App.3d 77 (1984). The plain, common usage meaning of the word spectator precludes criminal liability: one who looks on, an eyewitness, etc.

As argued below, Petitioners assert that any spectator or other person present who encourages a crime can be prosecuted as an aider and abettor; whereas mere presence at the scene and failure to take steps to prevent a crime do not establish aiding and abetting. Pinell v. Superior Court, 232 C.A.2d 284 (1965); In Re Michael T., 84 C.A.3d 907 (1978). The definition of aiding and abetting must include an intent to encourage or facilitate the criminal offense. People v. Henderson, 163 C.A.3d 1001 (1985).

Either spectators and others present

at a crime are aiders or abettors or they are not. If they are, they are criminally liable; if they are not, and are merely spectators, they should be constitutionally protected from criminal prosecution. If they are not so protected, mere passers-by or those who chose not to get involved in reporting crime would fall under the broad sweep of the statute and face prosection.

The distinctions made in the state courts between presence, purposeful presence, spectating, purposeful spectating, etc. avoid clarifying the ultimate issue: what is the criminal liability for spectators and others present at the commission of a crime.

CONCLUSION

For the reasons stated herein Certiorari should be granted Petitioners.

Should the Court hold the California Court of Appeal, Fifth Appellate District, incorrectly upheld the constitutionality of the statute, the matter should be remanded to the Justice Court for appropriate action.

DATED: November 14, 1988

Respectfully submitted,

CYNTHIA CALVERT
Counsel of Record
2323 E. Olive Avenue
Fresno, CA 93701

LEN W. HOLT
1817 Carleton Street
Berkeley, CA 94703

ATTORNEYS FOR PETITIONERS

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

No. S006413
FIFTH DISTRICT, NO. F009407

People,
Petitioner,

v.

Superior Court of the County of Fresno,
Respondent; Richard Elder et al,
Real Parties in Interest,

[Filed Sep. 15, 1988]

ORDER DENYING REVIEW

Petition for review of Real Parties in Interest DENIED.

Mosk, J., is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

No. F009407

Super. Ct. No 368057-6

THE PEOPLE,

The Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent,

RICHARD ELDER et al.,

Real parties in interest

O P I N I O N

ORIGINAL PROCEEDINGS.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, W. Scott Thorpe and Edgar A. Kerry, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Calvert & Milrod and Cynthia Calvert for Real Parties in Interest.

Daniel Yamson for Amicus Curiae on behalf of Real Parties in Interest.

-ooOoo-

We are asked to review an order of the superior court granting mandamus relief which protected the real parties in interest from prosecution under Penal Code[1] Section 597b[2] as "spectators" at a cock fight. Despite an apparently long history of unchallenged enforcement

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] Section 597b provides:

"Any person who, for amusement or gain, casuses any bull, bear, cock, or other animal, not including any dog, to fight with like kind of animal or creature, or causes any such animal, including any dog, to fight with a different kind of animal or creature, or with any human being; or who, for amusement or gain, worries or injures any such bull, bear, cock, dog or other animal, or causes any such bull, bear, cock, or other animal, not including any dog, to worry or injure each other; and any person who permits the same to be done on any premises under his charge or control; and any person who aids, abets, or is present at such fighting or worrying of such animal or creature, as a spectator, is guilty of a misdemeanor."

of the subject statute, the superior court agreed with the contention of the real parties in interest that the word "spectator" was impermissibly vague; it could be construed to criminalize innocent presence at a cockfight as well as purposeful attendance. We agree that facially the relevant portion of section 597b is not sufficiently certain for due process concerns. However, the analysis does not stop there. As explained below, we find a fair and reasonable construction of the relevant portion of section 597b prohibits a person from being knowingly present as a spectator at such fighting or worrying of an animal for the purpose of watching such fighting or worrying.

On July 24, 1986, petitioner filed a first amended complaint in the Fowler Justice Court alleging, in relevant part:

"COUNT ONE
"VIOLATION OF SECTION 597(b) [sic] OF THE PENAL CODE, a misdemeanor. The [real parties in interest], on or about June 14, 1986, did willfully and unlawfully aid, abet, and be present, as a spectator, at the fighting and worrying of cocks with like kind and different kind of animal and creature."

Real parties in interest unsuccessfully demurred to the charge on the grounds section 597b criminally sanctioned conduct which was constitutionally protected, that is, being a spectator. Thereafter, real parties in interest petitioned defendant to mandate that the justice court sustain the demurrer and dismiss the charges brought under section 597b.

Following briefing and a hearing on the matter, the superior court issues the following order:

"Petitioners are correct in stating that neither mere presence at the scene of a crime, if such presence does not itself assist commission of the crime, nor mere knowledge that the crime is being committed and the defendants'

failure to prevent it, is not, in and of itself, a crime. See CALJIC 3.01, 1984 Rev.; In re Michael T. (1979) 84 Cal.App.3d 907.

"Further, if one examines the word `spectator' as set forth in the statute, he/she will not be put on notice as to what conduct is criminal. That is, if one were to merely pass by and look upon the activity, he/she could arguably be subject to criminal prosecution. Such a definition and application violate the notion of fair notice and due process. See Connally v. General Construction Co. (1926) 269 U.S. 385.

"This meaning is reinforced by a review of WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY which defines `spectator' as follows:

"`. . . . one who looks on; one who sees or beholds a given thing or event without taking an active part . . . .' (Emphasis added.)

"Thus, the term as used in the statute appears to require mere presence without any active participation by a person witnessing a cockfight.

"For the reasons set forth on the record at hearing, the writ of mandate is granted to the extent of deleting the unconstitutional portion of Penal Code section 597 relating to being a mere `spectator [sic].'"

Arguing the disputed language of section 597b is not unconstitutionally

vague but rather provides fair notice of what constitutes criminal conduct, petitioner seeks review of defendant's order. The petition also raises the issue of whether the People are entitled to writ review of the order.

DISCUSSION

I. Reviewability

This court requested briefing concerning whether the People were entitled to writ review of the superior court's order. We cited People v. Drake (1977) 19 Cal.3d 749. Drake recognized section 1238, which restricts the People's right to appeal in criminal cases is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs. It is a substantive limitation on review of trial court determinations in criminal trials. (Id. at p. 758, citing

People v. Superior Court (Howard) (1968) 69 Cal.2d 491, 498.)

As real parties in interest observe, the superior court has struck only a portion of section 597b, in effect ordering the justice court to sustain the demurrer on the "spectator" allegation. The real parties in interest remain charged on an aiding and abetting theory under section 597b. However, the People's ability to appeal with regard to a ruling on demurrer is limited to those cases where there is a "judgment for the defendant on a demurrer to the indictment, accusation, or information." (Section 1238, subd. (a) (2); emphasis added.)

In People v. Rehman (1964) 62 Cal.2d 135, the court held an order sustaining a demurrer which did not result in a judgment was not the equivalent of a

judgment, for appellate purposes. To permit otherwise would not carry out the intent of the legislature in using the word "order" in section 1238, subdivision (1),[3] and the word "judgment" in subdivision (2). Accordingly, real parties in interest in this action argue the prosecution may not obtain appellate relief unauthorized by the legislature by substituting a pre-trial mandamus petition as its appellate method.

Real parties in interest, however, fail to take account of a line of cases starting with People v. Yoshimura (1976) 62 Cal.App.3d 410, in which some

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[3] Section 1238, subdivision (1), as described in Rehman is now section 1238, subdivision (a)(1) which provides:

> "(a) An appeal may be taken by the people from any of the following:
>
> "(1) An order setting aside the indictment, information, or complaint . . . . "

appellate courts have afforded writ review of an order sustaining a demurrer to a single court. In Yoshimura, the People purportedly appealed from the order sustaining such a demurrer.[4] The appellate court dismissed the appeal consistent with section 1238. However, it suggested the prosecution should seek reconsideration from the trial court or, if necessary, a writ from the appellate court. (Id. at pp. 412-413.) After unsuccessfully seeking reconsideration, the People filed a mandamus petition which the appellate court ultimately granted. (Id. at p. 416.) Notably, the Yoshimura court did not discuss its reasoning for permitting writ review.

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[4] Interestingly, as in the present case, the trial court had found the section defining the charge, section 12312 (possession of materials with intent to make explosive or destructive devices) unconstitutionally vague. (Id. at p. 413.)

Nevertheless, a petition for hearing in Yoshimura by the California Supreme Court was subsequently denied. (Id. at p. 416.)

Since then the appellate courts in People v. Superior Court (Jennings) (1986) 183 Cal.App.3d 636, 640, People v. Superior Court (Kizer) (1984) 155 Cal.App.3d 932, 935, People v. Superior Court (Colbert) (1978) 78 Cal.App.3d 1023, 1026, have permitted writ review of orders sustaining demurrers.

The Jennings court merely cited Yoshimura, Kizer and Colbert, and stated the People properly filed a petition for extraordinary relief. The Kizer court observed, without explanation:

> The Legislature has indicated its intention to give the People a right to appellate review of a trial court decision on a demurrer. (Compare People v. Drake (1977) 19 Cal.3d 749, 758 [139 Cal.Rptr. 720, 566 P.2d

622].)* (Kizer, supra, at p. 935.)

In both Jennings and Kizer, petitions for hearing were also denied. (Jennings, supra, 183 Cal.App.3d at 648; Kizer, supra, 155 Cal.App.3d at 936.)

The Colbert court similarly concluded writ review was available. It reasoned the trial court had sustained the demurrer to a special circumstance allegation on grounds unrelated to any opinion as to guilt or innocence before jeopardy had attached. It also noted the appellate court held in People v. Superior Court (Brodie) (1975) 48 Cal.App.3d 195, 198-201, writ review was available to the People where the trial court struck a special circumstance allegation before trial.

In Brodie, the appellate court discussed in some detail People v. Superior Court (Howard), supra, 69 Cal.2d

491, cited by the court in Drake, supra. It was in Howard that the state supreme court first held the restriction on the People's right to appeal was not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs, but was a substantive limitation on review. (Howard, supra, at p. 498.)

The Brodie court analyzed Howard and determined the People were not denied resort to an extraordinary writ under all circumstances. (Brodie, supra, 48 Cal.App.3d at p. 200.)

> "In the Howard case, the trial judge had dismissed an information on his own motion after the jury had returned a verdict of guilty. The People sought a writ of mandate to set aside the trial court's order of dismissal. In denying the People's application for relief the Supreme Court said: 'To permit the People to resort to an extraordinary writ to review where there is no right to appeal would be to give the

People the very appeal which the Legislature has denied to them.' (69 Cal.2d at p. 499.)

"After analyzing the prior decisional law, the Howard opinion stated: `. . . Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.

"`Assuming that in some cases the matter may be of such importance that mandate may be available to the People to review determinations where appeal does not lie, we are satisfied that the proper balancing of these considerations prohibits review by mandate at the request of the People where, as here, there is a danger of further trial or retrial.' (69 Cal.2d at p. 501.)

"Immediately following that passage the court disapproved two Court of Appeal decisions `which permitted the issuance of mandate where there was a danger of retrial.'" (Brodie, supra, at pp. 199-

200.)

The Brodie court also relied on People v. Superior Court (Edmonds) (1971) 4 Cal.3d 605, in which the court granted a People's writ to require the trial court to set aside its order permitting the defendant to renew, at trial, a pretrial suppression motion. In Edmonds the trial court had no jurisdiction over the subject matter of the defendant's renewed motion to suppress. In addition, since the court granted defendant's motion at the close of trial but before judgment was entered, there was no danger of further trial or retrial if the trial court's order were set aside. (Edmonds, supra, 4 Cal.3d at p. 609.)

Returning to Brodie, that court found:

> ". . . The Howard case is different from the present case in two important respects: first, in Howard the order of

> dismissal was made after the case had been tried; here the order to be reviewed was made before jeopardy had attached. Second, the ruling in Howard involved the issue of guilt, the trial judge having made his order of dismissal because he felt the defendant was entitled to an acquittal; here the order involved the trial court's interpretation of a statute, unrelated to any opinion as to guilt or innocence.
>
> . . . . . .
>
> ". . . When a trial judge strikes out [a special circumstance] allegation solely because of a misinterpretation of the statute, its order is in excess of its jurisdiction. (See Howard, supra, 69 Cal.2d at p. 500.) In the case at bench, considering the gravity of the charge, the importance of the issue and the absence of any showing of prejudice by the delay involved in the review procedure, a weighing of the factors referred to in the Howard opinion does not preclude review by this mandate proceeding." (Brodie, supra, 48 Cal.App.3d at pp. 200-201.)

In the present case, we cannot say the superior court acted in excess of its

jurisdiction in considering the constitutionality of section 597b. Petitioner nevertheless contends the court exceeded its jurisdiction by failing to properly interpret or follow the law. The People cite In re Richard C. (1979) 89 Cal.App.3d 477, 484, in which the appellate court reviewed an order granting rehearing of a suppression motion.

Interestingly, one of the cases to which Richard C. referred on this point was Brodie. Upon review of Richard C., it appears the People take the remark concerning excess of jurisdiction out of context. The relevant question is whether the trial court failed to properly interpret or follow the law defining its jurisdiction, not whether the court incorrectly interpreted the law on the merits of the issue raised.

Thus, an order sustaining a demurrer, or more precisely in this case, directing the justice court to sustain the demurrer, is not in excess of the superior court's jurisdiction.

In light of Yoshimura, Jennings, Kizer, and Brodie, however, it spears the determining factor is no longer whether the trial court acted in excess of jurisdiction. Instead, at least with People's petitions for writ review of orders sustaining demurrers, the focus is on balancing the prevention of harassing the accused, as against correcting possible errors. (Howard, supra, 69 Cal.2d at p. 501.) At the pretrial stage there can be little, if any, risk of harassment to the accused since there is no danger of further trial or retrial. The opportunity for correcting possible errors is also great in such a situation.

Moreover, in this particular case, as in Yoshimura, where a court has found a provision unconstitutional, there is otherwise no opportunity to consider the propriety of that finding without writ review. (See Section 1238.)

We conclude, therefore, the People are entitled to writ review in this case.

II. Constitutionality of Section 597b

Due Process requires a statute be definite enough to provide a standard of conduct for those whose activities are proscribed and a standard for police enforcement and ascertainment of guilt. (Burg v. Municipal Court (1983) 35 Cal.3d 257, 269.) In this case real parties urged, and the superior court agreed, section 597b, specifically the language, "any person who. . . is present at such fighting . . . as a spectator," did not

provide fair notice of what conduct was criminal.

> "`Fair notice' requires only that a violation be described with a `"reasonable degree of certainty"' (People v. Mirmirani [1981] 30 Cal.3d 375, 382) so that `ordinary people can understand what conduct is prohibited.' (Kolender v. Lawson [1983] 461 U.S. 352, ___ [75 L.Ed.2d 903, 909, 103 S.Ct. 1855, 1858].) The notice provided must be such that prosecution does not `trap the innocent' without `fair warning.' (Grayned v. City of Rockford (1972) 408 U.S. 104, 108 [33 L.Ed.2d 222, 227, 92 S.Ct. 2294].)" (Burg, supra, at pp. 270-271.)

The superior court determined the relevant portion of section 597b could be interpreted to proscribe mere presence without any active participation by a person witnessing a cockfight. The People contend the disputed language requires more for criminal conduct, namely: the person be present and "participate" as a spectator, at a

cockfight or worrying of a cock, which event is for the amusement or gain of the person causing the fight or the worrying or injuring of the cock. Thus, the People argue the relevant portion of section 597b is not unconstitutionally vague.

To analyze the relevant portion of section 597b, we look first to the language itself, second to the legislative history, third to the case law, and last, to canons of statutory construction.

A.

"Spectator" is not a technical, legal term, but rather a word of common usage. (Pryor v. Municipal (1979) 25 Cal.3d 238, 246.) Dictionary definitions of the word include "1. One who attends and views a show, sports event, or the like. 2. An observer of an event;

eyewitness; onlooker" (The American Heritage Dict. (New College Ed. 1981) p. 1241), or "One that looks on or beholds; esp: one witnessing an exhibition (as a sports event)." (Webster's Third International Dictionary (1986) p. 2188.) Given such definitions, "spectator" may apply to the purposeful observer of a cockfight as well as the mere passerby. Thus, on its face the relevant portion of section 597b is not sufficiently certain for due process purposes.

B.

Our examination of section 597b's legislative history discloses nothing regarding how the relevant portion of section 597b should be construed. The relevant language first appeared when the Legislature enacted Chapter 292, Statutes of 1872, amending "An Act for the more effectual prevention of cruelty to

animals" which had been adopted in 1868. Section 6 of the 1868 act was amended to provide in pertinent part:

> "Any person who shall cause any animals, bull, bear, dog, cock, or other creature, to fight, worry, or injure each other, or any person who shall permit the same to be done on premises under his charge or control, and any person who shall aid, abet, or be present at such fighting and worrying of such animals as a spectator for an admission fee, shall on conviction be deemed guilty of a misdemeanor; provided, that this shall not apply to officers of said society, peace or police officers, or to witnesses authorized by the Board of Trustees of said society to be present at such fight for the purpose of giving evidence before the Police Judge, Magistrate, or the Grand Jury of the county in which the offense is committed." (Stats. 1872, ch. 292, Section 2, p. 394.)

However, the amending act applied only to the City and County of San Francisco. (Stats. 1872, ch. 292, Section 3, p.394.) There is nothing in

the state archives to explain this amendment.

In 1874, the Legislature repealed the above described acts (Stats. 1874, ch. 340, Section 18, pp.502-503) and enacted a new act for the more effectual prevention of cruelty to animals. The new act, which was to be applied statewide, provided in relevant part:

> "Any person who shall cause any bull, bear, cock, dog or other animal to fight for his amusement or for gain, worry or injure each other; or any person who shall permit the same to be done on any premises under his charge or control; and any person who shall aid, abet, or be present at such fighting and worrying of such animal, as a spectator, shall, upon conviction, be deemed guilty of a misdemeanor." (Stats. 1874, ch. 340, Section 88, pp. 500-501).

As can be seen, the language regarding an admission fee and exemption for those gathering evidence to prosecute the criminal conduct was omitted in the 1874

act.

Once again there is no explanation for the modification. The People nevertheless argue the deletion of the admission fee requirement reflected the Legislature's desire to proscribe the conduct of those spectators who were present to gamble as well as those who simply paid an admission fee. According to the People, such gamblers were as essential to perpetrating the "evil of cockfighting" as those who paid an admission fee. Absent some legislative history, we have nothing but speculation to support such an inference.

As to the exemption language, the People argue the Legislature considered the language unnecessary and thus deleted it. Again, however, while this may appear logical, we can find no basis for making such an assumption in the absence

of some legislative history to support it.

The relevant language was incorporated in the Penal Code as part of the new section 597b in 1901. (Stats. 1901, ch. 158, Section 156, p. 470.) Subsequent amendments of section 597b have not involved or affected the language in question here, except that a special section relating to fighting dogs was added in 1975. The prohibition against fighting dogs for amusement or gain was then set forth in section 597.5. (Stats. 1975, ch. 1075, Sections 1-2, pp. 2634-2635.)

C.

Further, there are no published California cases which discuss section 597b, let alone the constitutionality of the portion of section 597b with which we are concerned. In several sister-state

jurisdictions, on the other hand, there are decisions construing statutes which prohibit animal fighting. Appellate courts have found statutes unconstitutionally vague which prohibit, without any reference to the person being a spectator, mere presence at an exhibition of animal fighting. (See State v. Young (Mo. 1985) 695 S.W.2d 882; State v. Wear (1984) 15 Ohio App. 77; State v. Abellano (1968) 50 Hawaii 384.)

By contrast, where a statute prohibited persons knowingly being present as spectators at a cockfighting, a Tennessee appellate court found the statute sufficiently specific and not unconstitutionally vague. (State v. Tabor (Tenn. 1984) 678 S.W.2d 45, 46.)

In Peck v. Dunn (Utah 1978) 574 P.2d 367, where the person was charged, under a local ordinance, as a party to or

present as a spectator at such fighting, the Utah appellate court found the law constitutional. It explained a sensible application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to a mere passerby. (Id. at p. 370.) The Peck court did not go to any lengths to explain how it could construe the statute in such a manner. Nevertheless, as we shall explain below, such an approach is an appropriate solution in this case.

D.

Here, the superior court found the relevant portion of section 597b unconstitutionally vague based on its very strict construction of the word "spectator" and use of a hypothetical

passerby whom the superior court felt could be the subject of prosecution under the section. Such a strict construction was erroneous. (American Communications Assn. v. Douds (1950) 339 U.S. 382, 412.)

As discussed below, in appropriate cases,courts have resolved similar questions involving statutes which, in broad language, have prohibited arguably lawful activities by resorting to a sensible but narrow interpretation of the statutory language. Such judicial analysis of legislative language is justified as furthering the obvious legislative purpose. We believe such an analysis is appropriate here.

Section 647, the disorderly conduct or vagrancy statute, has been the subject of many void-for-vagueness challenges. Words in the section such as "loitering" and "solicits. . . lewd or dissolute

conduct" have drawn considerable attention. Prosecution of a suspected thief found standing in a bus depot was permitted in In re Cregler (1961) 56 Cal. 2d 308. Yet, our state's high court permitted the prosecution only after it restricted the generality of the vagrancy statute to a narrow interpretation of the words, presumably intended by the Legislature: "As proscribed by the statue, the word `loiter' obviously connotes lingering in the designated places for the purpose of committing a crime as opportunity may be discovered." (Id. at p. 312.)

The state supreme court later explained in Pryor v. Municipal Court, supra, 25 Cal.3d 238, 256, such a statutory interpretation serves "not only to define the reach of the law but also to add a requirement of specific intent,

a feature which has often served to avert a determination that a statute is unconstitutionally vague."

In Pryor, the "lewd or dissolute conduct" language of the same section was challenged. The court found the words were quite subjective and could include conduct not intended to be proscribed. (Id. at p. 246.) However, it found no express guidance in the legislative history and much confusion in the intermediate appellate courts. (Id. at 247-253.)

Although the Pryor court found the section did not meet constitutional standards of specificity, the matter did not end on that note. The court observed its judicial obligation to provide a construction of the words which gives "specific content" to the terms which otherwise would be vague. (Id. at p.

253.) Of course, this could only be done when the construction was fair and reasonable. (Ibid.) The court then construed the section to prohibit solicitation or commission of sexually oriented conduct in public for certain purposes and when the actor knows or should know of the presence of persons who may be offended by the conduct. (Pryor, supra, 25 Cal.3d at pp. 256.)

Real parties in interest urge that a spectator should not be found criminally responsible despite a specific intent requirement. They try to analogize a mere witness to a crime, i.e. murder, to a spectator at a cock fight. However, a witness to a murder is not similarly situated to a spectator at a cock fight. In section 597b, the Legislature has acknowledged the crime of cock, or other animal, fighting is euphemistically a

"sport" to some. Knowingly present spectators who purposefully watch cock fighting encourage the "sport." By contrast, a witness to a murder or other crime does not, under ordinary circumstances, encourage the crime.

Accordingly, we read into the relevant language of section 597b a specific intent requirement and construe it to require knowing presence as a spectator for the purpose of watching the animal fighting. We distinguish the noncriminal act of merely catching a glimpse of animal fighting in progress from the prohibited status of being knowingly present for the purpose of watching the animal fighting as it progresses. Such an interpretation is consistent with, and implicit in, the Legislature's intent to prevent cruelty to animals. Without the presence of

spectators who purposefully watch the animal fighting, much of the "sport" in animal fighting would be eliminated.

We take note of recently enacted section 597.5 relating to fighting dogs. The Legislature prohibited, among other things, spectator conduct in this fashion: ". . . knowingly present at that exhibition. . . with the intent to be present at that exhibition . . . ." These specific-intent words are equivalent to ours of "purposeful presence" as a spectator. We conclude while the draftsmanship was more precise in section 597.5 than in the more generalized section 597b, the Legislature merely overlooked making a similar revision in the latter section. (See People v. Calban (1976) 65 Cal.App.3d 578.)

Accordingly, we hold the relevant

presence as a spectator for the purpose of watching the animal fighting and is constitutional as construed. The petition for a peremptory writ is granted. Respondent court is directed to vacate its order of September 16, 1987, granting the real parties' Petition for Writ of Mandate.

/s/_____
Woolpert, Acting P.J.

WE CONCUR

/s/_____
Ballantyne, J.

/s/_____
Stone, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

No. 368057-6 Dept. 6

ORDER RE WRIT OF MANDATE

RICHARD ELDER, et al.,

Petitioners,

v.

FOWLER JUSTICE COURT,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Part in Interest.

Petitioners are correct in stating that neither mere presence at the scene of a crime, if such presence does not itself assist commission of the crime, nor mere knowledge that the crime is being committed and the defendents' failure to prevent it, is not, in and of itself, a crime. See CALJIC 3.01, 1984 Rev.; In re Michael T. (1979) 84

Cal.App.3d 907.

Further, if one examines the word "spectator" as set forth in the statute, he/she will not be put on notice as to what conduct is criminal. That is, if one were to merely pass by and look upon the activity, he/she could arguably be subject to criminal prosecution. Such a definition and application violate the notion of fair notice and due process. See Connally v. General Construction Co. (1926) 269 U.S. 385.

For the reasons set forth on the record at hearing, the writ of mandate is granted to the extent of deleting the unconstitutional portion of Penal Code section 597 relating to being a mere "spectator."

DATED: September 16, 1987.

/s/ MARIO G. OLMOS
Mario G. Olmos
Superior Court
Judge

APPENDIX D

SUPERIOR COURT TO CALIFORNIA

COUNTY OF FRESNO

No. 368057-6 Dept. 6

ADDENDUM TO ORDER RE WRIT OF MANDATE

RICHARD ELDER, et al.,

Petitioners,

v.

FOWLER JUSTICE COURT, Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Inadvertently omitted at page 2, line 3 from the Court's September 16, 1987 order is the following:

This meaning is reinforced by a review of WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY which defines "spectator" as follows:

> " . . . one who looks on; one who sees or beholds a given thing or event <u>without taking an active part</u> .... " (Emphasis added.)

Thus, the term as used in the statute appears to require mere presence without any active participation by a person witnessing a cockfight.

DATED: September 18, 1987.

/s/ MARIO G. OLMOS
Mario G. Olmos
Superior Court
Judge